IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

No. 1930

THE UNITED STATES,
Appellant,
vs.
THE MINIDOKA & SOUTHWESTERN RAILROAD COMPANY, a Corporation, and the UTAH CONSTRUCTION COMPANY, a Corporation,
Appellees.

PETITION FOR REHEARING

P. L. WILLIAMS,
D. WORTH CLARK,
Attorneys for Appellees.

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Now come the appellees above named in the above entitled cause, and respectfully petition the Court to recall and set aside the opinion heretofore filed, and the decree and order entered thereon, and to grant a rehearing of said cause; and, for grounds of such petition, respectfully urge that this Honorable Court has inadvertently committed error to the manifest and great prejudice of the petitioners and in the following respects, to-wit:

First. In holding that the Homestead lands involved in this suit are such public lands as are subject to the provisions of the general Right of Way Act of March 3, 1875.

Second. Assuming that they are subject to the provisions of said Act, the Court is in error in holding that it was necessary to file a profile map showing the location of the said road.

Third. In holding that the homestead settlers and entrymen on said lands had thereby nothing more than a possessory right thereto prior to the time when they shall have paid for the land and for the water charges as provided in the Reclamation Act.

LANDS ENTERED AT LAND OFFICE NOT PUBLIC LANDS SUBJECT TO ACT, MARCH 3, 1875.

In presenting this question we call attention to the fact that in the right of way act of March 3, 1875, it is stated that a right of way through the **public lands** of the United States is hereby granted, etc. It becomes necessary, threfore, for the court to determine the meaning of the phrase "public lands" as used in this statute and we respectfully submit that this court is in error in holding that lands in the possession of homestead entrymen and upon which valid filings have been made and that still exist are public lands of the United States within the meaning of the statute. Perhaps no better statement of the effect of an entry of public lands under the Homestead Law can be given than that contained in the opinion of the Supreme Court of Minnesota in

the case of Red River and Lake of the Woods Railroad Company vs. Sture, 20 Northwestern Reporter, 229. That statement is as follows:

> "It is claimed, however, that an entry under the homestead law gives the settler n ovested rights in the land until the issue of the patent. To this we cannot assent. We are aware that it has been authoritatively decided in Frisbie v. Whitney, 9 Wall. 187, and the Yomesite Valley case, 15 Wall. 77, that occupation and improvement on public lands with a view of pre-emption do not confer any vested right in the land as against the United States; that this is only obtained when theh purchase money has been paid and the receipt of the land-office given to the purchaser. This is put upon the ground that until such time the proposed pre-emptor has merely a right to be preferred in the purchase over others, provided a sale is made by the United States. But a homsteader, after entry, occupies an entirely different position, he has in fact purchased. His entry, which is made by making and filing an affidavit and paying the sum required by law, is a contract of purchase which gives him an inchoate title to the land, which is property. This is a substantial and vested right which can only be defeated by his failure to perform the conditions annexed. It is true, no certificate or patent can be issued until the expiration of five years from the date of the entry; the United States retaining the legal title to insure performance of these conditions. But the vested right of

> the settler attaches to the land at the time of his entry, and is liable to be defeated only by his own failure to comply with the requirements of the law. If he complies with these conditions he becomes invested with full ownership and the absolute right to a patent, which, when issued, relates back to the time of the entry; and under the act of May 14, 1880, (21 U. S. St. 140) his right under the entry relates back to the date of the settlement. Until forfeited by his own failure to perform the conditions of his purchase, this right of property acquired by his entry must prevail, not only against individuals, but against the government itself."

And this holding seems to be in entire harmony with the decisions of the land department. One of the earliest cases decided by that department is the case of Graham vs. Hastings and Dakota R. R. 1 L. D. 362, and in that case the Secretary uses the following language:

> "On the other hand, it has always been the invariable custom of the Department to regard land appropriated under the homestead law as removed from preemption settlement and homestead entry, and not again subject to either until the homestead entry is canceled, whereupon the land reverts to the government, and as a part of the public domain becomes subject to either.
>
> Until after the expiration of the pe-

riod in which the settlement and improvement can be proven, the government presumes that the homestead claimant is acting in good faith, unless the contrary be shown in the manner prescribed by the statute; but until such showing a forfeiture cannot be declared.

When an entry thereof is made under those laws (whether pre-emption, homestead, or other) the particular land entered thus becomes aggregated from the mass of public lands, and takes the character of private property. 'In no just sense,' observe the supreme court in Witherspoon v. Duncan (4 Wall. 218) 'can lands be said to be public lands after they have been entered at the land office and a certificate of entry obtained. If public lands before entry, after it they are private property.' (Opinion of the Attorney-General, 8 C. L. O., 72.)

In the light of the judicial interpretation of the term 'entry,' as it is used in the public land laws, I am constrained to the opinion that an entry of record, which on its face is valid, is such an appropriation of the land covered thereby as to reserve the same from the opration of any subsquent law, grant, or sale, until a forfeiture is declared and the land is restored to the public domain in the manner prescribed by law.''

Bearing in mind the rights acquired by an entryman as above explained it seems quite clear that lands so held are not public lands and that the act of

March 3, 1875, does not apply thereto. Such has been the uniform holding of the Department where approval of maps has been requested of it across entered lands.

The case of Montana Central R. R. Co., 25 L. D., 250, is so directly in point and so fully and completely covers the case at bar that we here quote the entire decision:

> "The Montana Central Railroad Company has appealed from the action taken in your office letter 'F' of May 29, 1896, holding that the tract covered by its station plat submitted for approval under the provisions of the act of March 3, 1875 (18 Stat., 482), covering a portion of the N. W. ¼ of the S. E. ¼ of Section 9, Township 8 N., Range 3 West, Helena land district, Montana, is not public land, and therefore that the plat of the station grounds is not subject to approval under said act.
>
> The statement contained in your office letter is that the tract applied for by the company is embraced in the mineral application, No. 179, filed by Charles W. Cannon et al., April 16, 1873.
>
> In its appeal the company admitted the existence of said mineral application, but set out that it had, under the laws of Montana, proceeded to condemn said tract to its use for station purposes in a suit against said locators, and that

the damages assessed against the said company had been paid into court.

The right of way granted by the act of 1875, supra, is limited to public lands; and where there are no public lands embraced within the application for right of way it has been uniformly held by this Department that an approval will not be granted.

While it appears that the company, as against the claim under said mineral application, is fully protected under the proceedings already had in the local court, its purpose in desiring the approval of its application for right of way under the act of March 3, 1875, is stated to be for the purpose of protecting it against any subsequent claimant for the land, in the event that the mineral applicants should abandon their claim.

A mineral application, while of record, is an appropriation of the tract covered thereby; and in the decision of the supreme court in the case of The Northern Pacific Railway Company v. Sanders (166 U. S. 621) was held to be a sufficient claim to except the lands covered thereby from the operation of the grant to said company.

It might be here stated ,in view of the fact that the company in its appeal states that it has been advised that Cannon and his associates have abandoned the land in controversy, that on April 22, 1897, the receiver at Helena reported

that the mineral applicants had instituted proceedings in the local office to perfect their application, No. 179, to mineral entry, and among the papers filed is their consent to the grant of the right of way to the Montana Central Railway Co.

Upon the facts disclosed by the record, I can find no error in the holding of your office, that the tract covered by the company's plat submitted for approval is not public land within the meaning of the act of March 3, 1875, and the plat is therefore not subject to approval under said act.

As the company states in its appeal that it has entered into possession of the lands and erected thereon a water tank, round-house and other buildings necessary to the operation of its railroad, no subsequent claimant, in the event that the mineral applicants fail to perfect their claim to entry, could secure a right that will defeat them in their possession, or that would prevent the approval of its plat, if again submitted upon the cancellation of the mineral application.

See St. P. M. and M. Ry. Co. v. Maloney et al., 24 L. D., 460. Dakota Central R. R. Co. v. Downey 8 L. D. 115.

Your office decision is accordingly affirmed."

See also:

Santa Fe Prescott R. R. Co., 22 L. D. 685.
Kem. Valley Water Co., 15 L. D. 577.

Again in Saint Paul, Minneapolis and Manitoba R. R. Co. 29 L. D. 18, a regulation is promulgated as follows:

> "If it does not appear that some portion of the public land would be affected by the approval of the maps, they will be returned advising the applicant of that fact."

These holdings of the land department that entered land is not public land subject to the provisions of the Right of Way Act of March 3, 1875, and that no right of way can be acquired thereover by the filing of a map are in harmony with, and are sustaine by, the decisions of the courts.

We invite your Honors' attention to the case of the Union Pacific Railroad Company vs. Harris, decided by the Supreme Court of Kansas, July 5, 1907, and reported in 91 Pacific Reporter, page 68. The grant of right of way to the railroad in this instance, so far as this question is involved, it is submitted is precisely the same as under the language of the Act of 1875 here involved. The court in that case says:

> "In construing railroad land grants the words 'public lands' are treated not as designating all lands which are public in the sense that the Government owns them and, technically speaking, may dispose of them as it sees fit, but as excluding at least every tract to which an indi-

> vidual has acquired under the settlement laws a valid claim that may ultimately ripen into a title, although no vested right has accrued to him at the time. This rule of construction has been definitely adopted by the federal Supreme Court."

Citing and reviewing numerous cases in that court which very clearly sustain the statement above quoted. The decision in this case was affirmed by the Supreme Court of the United States, and is reported in 215 U. S., page 386.

In Bardon v. N. P. Ry. Co., 145 U. S., 535, the court, after quoting the law involved in that case and which made a grant of "public lands," and stating the facts in connection with it, uses the following language, at page 538:

> "It is thus seen that, when the grant to the Northern Pacific Railroad Company was made, on the 2d of July, 1864, the premises in controversy had been taken up on the pre-emption claim of Robinson, and that the pre-emption entry made was uncanceled; that by such pre-emption entry the land was not at the time a part of the public lands; and that no interest therein passed to that company."

In Hastings & Dakota Railroad Co. v. Whitney, 132 U. S. 357, the court, at page 361, quotes, with approval, the declaration in Witherspoon v. Duncan, 4 Wallace 210, that lands originally public, cease to

be public after they have been entered at the land office and a certificate of entry has been obtained; and further declared that this applies as well to Homestead and Pre-emption entries as to cash entries. That, in either case, the entry being made and the certificate being executed and delivered, the particular land enetred thereby becomes segregated from the mass of public lands and takes the character of private property. And, at page 363, after stating what action is requisite to constitute an entry under the Homestead Laws, follows on page 364 by using the following language:

> "So long as it remains a subsisting entry of record, whose legality has been passed upon by the land authorities, and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, and, therefore, precludes it from subsequent grants."

If the foregoing statement of law is a correct one, then it seems clear that when a homestead entryman has made a valid entry as required by law upon a portion of the public domain, that as long as he retains the possession of the land and complies with the conditions of the Homestead Act there is no power in any individual or in the Government itself to dispossess him, so long as he complies with the requirements of the law. He has an interest in the land. It is not public land to the extent that

the Government of the United States can take it away from him,and theGovernment cannot dispossess him unless on account of some reservation contained in the law under and pursuant to which the entryman filed upon the land, or by a failure on his part, to perform the conditions required by law to perfect his title. Therefore, we my safely assume that if the entryman himself desires to build a railroad from one corner of his land to the other there would be no power resting in the government to prevent it. If the entryman should desire to construct a schoolhouse upon his land and permit the children of the neighborhood to attend school there, there would be no power in the government to prevent it. If the entryman desired to allow his neighbor to conduct water through a ditch across this tract of land, there would be no power in the government to prevent it. In other words, the entryman has the right to exclusive possession of the land. Recognizing this right of possession and this interest which the entryman has, the Congress of the United States provided a method whereby the homestead entryman might dispose of this right of possession for certain purposes, among which is included the right of way of a railroad. Now in this case when this railroad is being constructed under a right of possession granted by the entryman himself, the United States asks the court to intervene and deny to the rairoad company the right of possession, unless it complies with the Act of March 3, 1875. In other words, while

such compliance would secure to it no right whatever as to such land, the court is asked to hold that the settler or homestead entryman cannot put any person in possession of any portion of his tract of land without the consent of the Government, specially granted in each instance, and notwithstanding the general law quoted in the opinion of the Court in this case (Sec. 2288, Rev. Stats.) authorizing the entrymen to do the exact thing they have done, viz.: to grant the right of way to the Railroad Company through their respective entries. The logical effect of this decision is to hold that the settler could not grant a right to construct a schoolhouse upon his land until he had first satisfied the United States. That the settler could not grant the right to one of his neighbors to construct a ditch on the land until he had first satisfied the United States, and the logical result of all this would be that the homestead entryman himself could not do any building on the land unless the United States granted him such special permission.

And now we desire to call attention to the position we find ourselves in if this court adheres to the opinion filed. This court says to us, you must file your map, and secure its approval because the land is public land. the Government says we will not accept the map or approve it because the land is not public land.

In concluding the discussion of this branch of the case we invite the attention of the Court to a de-

cision of the Supreme Court of Utah in the case of the Oregon Short Line Railroad Company v. Fisher et al., 72 Pac. Rep. 931. The facts in this case are particularly illuminating on the point here involved, and the syllabus of the Court as reported is completely supported by the reasoning and language of the court in its opinion, and is as follows:

> "A grant to a railroad company by Act of Congress of a right of way over public lands does not include lands which, at the time of the grant, are subject to an existing, uncanceled homestead entry."

IF MAP COULD HAVE BEEN FILED AND APPROVED, NOT NECESSARY IN THIS CASE.

We desire to again urge upon the court our understanding of the law that it is not necessary to file a map in accordance with the provisions of Section 4 of the Act of March 3, 1875, in cases where the railroad company has placed itself in such a position as to become specifically a grantee under the Act and has in addition to placing itself in that position actually constructed its road upon the ground. The first interpretation of this statute on this point seems to have been by the land department, and the opinion filed is entirely clear. The case referred to is the case of Dakota Central Railroad vs. Downey, 8 L. D., 115. We quote from this decision at length, as follows:

"This case involves a consideration of the act of March 3, 1875, granting to railroads the right of way through the public lands of the United States; and the difficulty is, to determine the extent to which the fourth section of the act is to be applied as a qualification of or limitation upon the present grant contained in the first section. It is obvious that the first section is a present grant. The language used is such as has repeatedly been declared by the supreme court to operate a present grant by Congress. This interpretation has been applied to grants of lands for right-of-way, of lands to aid in the construction of railroads, wagonroads, and canals, and to the swamp land grant to the states by the acts of 1849 and 1850. The cases of Railroad Company v. Baldwin (103 U. S., 429), the Central Pacific Railroad Company v. Dyer (1 Sawyer, 641), and the Central Pacific Railroad Company v. Benity (5 Sawyer, 118), are illustrations of the application of this rule of interpretation to grants of rights-of-way to railroads.

But it will be noticed that there is one point of difference between the present grant of this act and those where a single grantee, as a State or a railroad company is named. In this grant, not only is the land indefinite in location, and therefore a float—in the language sometimes employed with respect to grants of land to aid in the construction of railroads or otherwise—but the particular corporation is indefinite and uncertain. In order, then, to make this grant attach, it is necessary to provide fixity of grantee, as well as fix-

ity of location upon the ground. To determine what company shall be considered as a grantee or beneficiary under this act, the first section provides simply that it shall be 'any railroad company organized under the laws of any State or Territory * * which shall have filed with the Secretary of the Interior a copy of its articles of incorporations, and due proofs of its organization under the same.' Immediately, therefore, upon the filing of these two documents, the company stands in the attitude of being named in the act, as entitled to its benefits, so far as the grantee is concerned—I think no farther; and that thereafter its relation is the same as that of the State, or the particular railroad company, to which, by similar acts grants of lands have been made for such purpose.

There must remain afterwards the necessity, in order to define the subject granted, to give fixity of location to the land. The same rule ought to determine the time when the grant becomes attached to particular land, which has been declared by the supreme court in respect to other cases of grants of floats. The act fixes this. It declares, in the first section, defining the present grant, that the company has granted to it the right of way, 'to the extent of one hundred feet on each side of the central line of said road; also the right to take from the public lands adjacent to the line of said road, material, earth stone, and timber necessary for the construction of said railroad; also ground adjacent to such right-of-way for station buildings, depots, machine-shops, side-tracks, turn-outs, and

water-stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.' As to the roadway, the construction of the road fixes the boundaries of the grant, and fixes it by the exact rule of the statute. As to the grounds for station buildings, etc., the right is absolute to the quantity named, for one station to each ten miles of the road. (Perhaps the approval of the Department is necessary to its specific definition; but that needs not to be now decided.) This must undoubtedly be the rule when the road is constructed over unsurveyed lands, because then every condition necessary to the vigor of the present grant is complied with. The fact that the railroad company may locate and construct its road upon unsurveyed lands is clearly recognized in the fourth section of the act; and the regulations of the Department have been made to apply to such cases, and authorizes such construction.

It seems to me that the fourth section of the act was written for another purpose and for another case. It relates to the case of a railroad company which desires to secure the present grant, and give to it fixity of location, before its roads shall be constructed; and it is designed to provide a similar privilege in respect to rights of way which acts granting lands to aid in the construction of railroads have provided—namely, the privilege of giving fixity of location to the subject of the grant before construction of the road. Thus it begins by stating that it relates to the case of 'any railroad company de-

siring to secure the benefit of this act.' Evidently, this language is used of a company which contemplates building a road, and it speaks of the filing of a profile of its road, as a thing to precede the construction. The proviso to this section also clearly indicates that the section was designed to relate to cases where the railroad company seeks to secure the definite location of its right-of-way before building; and it indicates a period of five years within which the company, after having secured its right-of-way, may build; but upon failing to do it the right-of-way shall be forfeited. It contemplates, first, the 'location' of the line of the road—authorizing it to be done in sections of twenty miles each. This 'location' must mean the determination by the corporation, through its stockholders or board of directors, of the projected line upon which it purposes to construct the road. That 'location' must precede construction; and it must also precede the filing of a profile, which is only another phrase for a map of definite location—a phrase frequently used in acts granting lands in aid of the construction of railroads. Then it is provided that, if the location be upon surveyed lands of the United States, this profile must be filed with and approved by the Secretary of the Interior, as the center line of the road; and being filed in the office of the register of the land office of the district where the public land is located, it is enacted that 'thereafter all such lands, over which such right-of-way shall pass, shall be disposed of subject to such right-of-way.' If, however, the railroad company has located its road upon

unsurveyed lands, but not constructed it, then, within twelve months after the survey by the United States, the profile of the road must be filed in like manner; and from that time the clause above quoted applies—'land over which such right-of-way shall pass, shall be disposed of subject' to it. It seems to me clear that the purpose of Congress in this 4th section was only to provide means by which railroads could define, or definitely locate, the right-of-way, of two hundred feet in width, with station grounds, etc., desired for the road which was to be thereafter constructed; and, that, as in the case of other grants or 'floats,' the right of the grantee, in its relations to settlers on the public lands attached from the date of filing the map of definite location.

But inasmuch as it is obvious that the railroad company has a perfect right to build upon unsurveyed lands, and that the construction of its road then fixes the exact line, from which the right-of-way is to be measured, in cases where a road has been constructed in fact, through unsurveyed land, its right is as perfect to the right-of-way defined by this statute, by measurement from its center line, as it is possible for it to be. The grant is complete, and defined in fact.

It does not become necessary for a road which has secured the benefits of this act, by taking the steps which give it the attitude of being named in the first section as a grantee, and by building a road through the public lands, whereby the subject of the grant has been defined, to

> file a map of definite location in order to entitle it to the benefits of the right-of-way.
>
> The fourth section is designed to provide a mode by which fixity of location can be secured to a grantee, in anticipation of that construction by which location is defined in the section making the grant, and which shall have the effect, before the construction of the road, which the terms of the grant limit to 'the central line of said road;' which only means—without the fourth section—a constructed road."

There is no ambiguity in this decision and in the case of Jamestown & Northern Railroad Company v. Jones, the Supreme Court of the United States expressly approved it and in addition to approving it expressly reiterated the doctrine therein contained after citing it. It must be borne in mind as stated by Secretary Vilas that the fourth section of the Act was written for an entirely different purpose, that is, for the purpose of giving the road fixity of location before construction. The fourth section seems to have no other purpose than to provide for notice to the government and to other occupants of public lands of the claim of the railroad company to the right of way. In other words, it is our contention that if the land is such land as is subject to the provisions of the Act of March 3, 1875, and the railroad company has filed its articles of incorporation and due proof and constructed its road, it is not within the power of the Secretary of the Interior to with-

hold from it the right of way. Therefore, in the present case if we had filed a map as provided by section four and such map was in proper form and filed in accordance with the provisions of the statute, and it affected "public lands," the Secretary could not have refused his approval, because he acts in a judicial capacity to the extent only, of passing upon the form of the filing and the question of whether the land is such land as is subject to the provisions of the act. This court has held that the land was such land at the date of the commencement of this suit as was subject to the provisions of the Act of March 3, 1875, therefore, the filing of a map was a mere formality because the railroad company was in such a position as to be able to take under the provisions of the act, because it had filed its Articles of Incorporation and due proof of its organization. Therefore, if a map is required it seems quite certain that the Secretary could not refuse his approval of such map and if he did so refuse his approval it would be an arbitrary action on his part, and, therefore, would not be of any validity. It seems clear to us, therefore, that Section 4 was enacted in order to give notice and for no other purpose, and when a company has constructed its road and by virtue of that fact has given notice, then the decision in Jamestown, Northern Railroad Company v. Jones applies.

In your opinion your Honors refer to the case of M. & St. P. etc. Ry Co. v. Doughty, 208 U. S. 251. In that case it was claimed by the railroad company

that the location and staking of its line was sufficient as against the filing of a Homestead entry after such location and staking and before the construction of the road was even begun, so far as the case discloses. This case in no way modifies the Jamestown case, in case of actual construction of the road without the filing of a map, because that construction is unmistakable evidence of notice of appropriation. We submit that the construction of a grade of a railroad is equally an unmistakable evidence, and evidence of appropriation, as though the ties and rails were laid and trains were being operated. In this case, the evidence shows record (111 Testimony of Engineer Robinson) that prior to the time this suit was begun a portion of the grade had been constructed; that such grading began in the year 1909, but he stated on direct examination that he could not recall from memory what portion of the grade had been constructed at the time the suit was begun, but, at the time he was testifying—which was upon the final hearing of the case on June 18, 1910,—the grading was completed (See record 113). It does not show how long prior to that date it had been completed; so that we submit the evidence shows, without contradiction, that there was such permanent work done in the way of constructing the road as operated to give notice of an appropriation of the line along which the grade was being constructed at the time the suit was begun and which had been completed at the time of the hearing in the court below.

In addition to this, we desire to respectfully urge that in view of the position taken by this court, the Government would not be entitled to an injunction, even though the law is as announced. This court finds that the land was such land as was subject to the provisions of the Act of March 3, 1875. This court in addition to that has before it a record which shows that the railroad company is entitled to take advantage of the provisions of this Act.

Therefore, the only thing necessary for this company to do in order to fully meet the requirements made by the court is to file its map and it is apparent from the record in this case that if such map were filed and the Secretary followed the plain mandate of the law, as laid down by your Honors, he would be compelled to approve it and thereby the right of way would pass to the company. Therefore, it seems plain that the Government is insisting upon a mere technical legal right and one which would not entitle them to come into a court of equity and enjoin the construction of a railroad enterprise of this kind. Under the decision of the court in this case what possible equity has the Government? The Congress of the United States has said that it would freely grant rights of way to public lands of the United States under certain conditions. This court has held that the land over which this road passes is public land of the United States subject to the provisions of the Act and that this railroad company is qualified to take the right of way. It appears that the railroad

company has in good faith purchased from the entrymen a right of way across their lands and now it is proposed to enjoin the railroad company from constructing its road across these lands merely because no map has been filed although the filing of such map is a mere formality. It seems that in any event the judgment of the court ought to be modified to such an extent that the injunction will only be issued if the company fails to file the map required within a reasonable time to be fixed by the court, and that the filing of the map should be sufficient evidence to justify the court in refusing to grant the injunction.

With reference to the position taken by your Honors regarding the necessity of filing the map, and that the map required by the Act is denominated a "profile:" we admit the definition which the court gives of a profile is unquestionably correct in a strict and technical sense; and yet, it is proper to state that in the thirty-six years since the passage of the Act of 1875, the Department has never required anything but an alignment map which represents merely the location of the line upon the ground. It will be noted in the opinion of the Secretary Vilas, 8 L. D. 115, from which we have above quoted at length, he remarks "that a 'location' must precede construction; and it must also precede the filing of a profile, which is only another phrase for a map of definite location —a phrase frequently used in acts granting lands in aid of the construction of railroads."

The regulations issued under the Act of 1875 have been revised from time to time and, quoting from the same as approved February 11, 1904, Regulation 6, we find: "The word profile, as used in this Act, is understood to intend a map of alignment;" and this same language is contained in several earlier issues of the regulations under this Act; and, indeed, according to our information, this defintion has always been given from the time when the first instructions were issued under this Act, and this construction so long adopted by the Department, having in charge the administration of this law, should surely be entitled to great weight.

We further submit that considering all of the provisions of Section 4, that it was a map of definite location which Congress itself had in mind, because of the purpose and object of requiring a map to be filed, for the section further provides: "and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way." So that, it would seem that it was a map of the right of way that the Legislature had in mind, and the purposes of filing it and noting upon plats is that the plats shall show the sub-divisions of the public land over which the line is located. In other words, the noting of the line upon the plats in the office gives notice to the public in the subsequent

entries of land of the existence of the right of way of the railroad.

THE RIGHTS OF HOMESTEAD ENTRYMEN ARE MORE THAN A MERE POSSESSION.

It seems clear to us, both upon consideration of the statute and the decisions of the courts, that the rights of a valid homestead entryman amounts to something more than mere "possessory claim" on the public lands. As stated in the opinion cited from the 20 N. W. Rep., that a homestead entry is under the provisions of the law made by making and filing an affidavit and paying the sum required by law, and that this constitutes a contract of purchase which gives the entrymen an inchoate title to the land, and that this interest is property. It is true under the Homestead Law conditions subsequent are to be performed by the entryman, after he has thus originated his entry, but if he performs those conditions he is then entitled to have his title evidenced by a patent. As stated in that case, when he has made his filing and paid the fees required, he has acquired a substantial right which can only be defeated by his failure to perform the conditions annexed; that it is true that no certificate or patent can be issued until the expiration of five years from the date of the entry, the Government retaining the legal title to insure performance of these conditions. We submit that this is a very clear statement of the rights of the

homestead entrymen under the law as it applies generally. It is true that in areas reclaimed under the Reclamation Act there are certain additional burdens laid upon the homestead entryman; as, for instance, he must reclaim by irrigation before he can have a patent at least one-half of his entry, and he must pay the amount per acre for his permanent water rights, which in the discretion of the Department may be extended over a period of ten years. But, the entrymen in these particular cases, having taken the initial steps by filing their affidavit, paying the fees required, and regularly becoming entrymen, if they shall perform all the conditions annexed to their entry they will be entitled to have a patent to the lands entered. All Acts of Congress providing means of disposing of vacant lands of the Government are in the nature of contracts obligating the Government to grant the individual a patent whenever he has complied with the provisions of the law in the particular case. When an individual in good faith initiates a claim by settlement, occupation and improvements, and complies with the requirements of the law as to making and perfecting his filings, he thereby acquires an inchoate right which he is entitled to have ripen into a perfect title whenever he has completed his period of residence, amount of cultivation or other specific requirement of the law. In these cases, amongst other requirements, is that the Government shall be reimbursed the expense incurred in providing the irrigation works and supplying the water for

the reclamation of these lands; and the title is withheld by the Government until all these conditions are performed by the entryman. The act of these entrymen in granting the right of way as authorized by law to the railroad company over their respective entries, does not relieve the entrymen from the necessity of complying with all the conditions before patent is obtaind, and they must pay the amount of money required to reimburse the Government for the water provided for irrigating their respective tracts; and the Government by withholding the patent retains the title to these lands to their entire extent, including the right of way granted to the railroad by the entrymen until all conditions are complied with. There is no contention made, nor can it be successfully made, that the conveyance of these rights of way to the railroad company can withdraw the lands so conveyed from the lien of the Government to secure the reimbursement for its expenditure as required by the law. We submit that the term "possessory claims" used in the third section of the Act of 1875 does not relate to land held by homestead entrymen under a valid filing, but applies to those who without any filing whatever have been permitted by the Government to occupy portions of its vacant lands, a mere occupant, settler, or squatter, as they have been variously designated. It was not the purpose of Congress that a railroad company should interfere with such possession under a grant of this nature without compensating such possessory claimant

for the interference with his possession or his improvement. It was such persons that it was intended to protect by that provision of the law in connection with the use of the term "possessory claims on the lands of the United States." They require such protection; the homestead entrymen did not. For the reason that his entry protected him against the encroachment of a railroad company, and because he had such right to prevent encroachments, Congress passed the Act authorizing the entryman—voluntarily, if he chose—to grant a right of way to a railroad across his entry. This construction and purpose of the provision is made clear by the decision of the United States Supreme Court in the case of Washington & Idaho Railroad v. Osborn, reported in 160 U. S. at page 103. This case arose upon the attempt of the railroad company to maintain its right under the Act of 1875 across a portion of the unsurveyed public lands of the United States which were at the time in the actual possession of, and upon which improvements had been made by, the settler, but as to which land he had made no filing of any kind whatever. The court in its opinion in that case maintains the doctrine that by the mere occupation and improvement of these lands no right accrued to the settler, (he having taken no steps under the law to secure title) that would preclude the Government from dispossessing him or otherwise dealing with the land he occupied as the absolute owner; but, while maintaining this doctrine in harmony with the cases of

Frisbie v. Whitney, the Yosemite Valley case, and many other cases decided in that court, the opinion proceeds:

> "On the other hand, it would not be easy to suppose that Congress would, in authorizing railroad companies to traverse the public lands, intend thereby to give them a right to run the lines of their roads at pleasure, regardless of the rights of settlers. Accordingly, when we examine the Act of March 3, 1875, upon which the plaintiff rests its claim of right to appropriate to its use, without compensation, the land and improvements of Osborn, we find, in the third section, an expressed provision saving the rights of settlers in possession;"

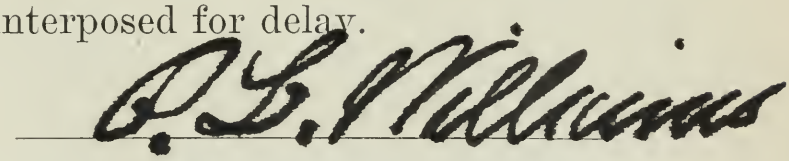
and then quotes the provision of the third section of the Act. And so, the court affirmed the judgment of the Supreme Court of the Territory of Idaho holding that in such case such settler being in possession of a portion of the public domain, but without having taken any step to secure a title, was protected by this provision of the law, and that he was entitled to compensation for the injury done his possessory claim by taking a portion of it for the right of way of the railroad.

Very respectfully submitted,

P. L. WILLIAMS,
D. WORTH CLARK,
Solicitors for Appellees.

I, the undersigned, one of the attorneys for the appellees in the above entitled cause, hereby certify

that in my opinion and judgment the above petition for rehearing is well founded in point of law, and that it is not interposed for delay.



Solicitor for Appellees.